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ATTACHMENT A

INFORMATION PAPER

1. Information Requested: Legal Analysis of Crude Oil and Refined Product Export Authorities

2. Background: Should cover pre-emergency and emergency situations, and the treatment of SPR oil.

3. Limitations: Presents only basic legal principles.

4. Presentation: A number of different laws govern crude and product exports, imposing restrictions which differ from one category of petroleum to another. There is ample authority to curtail exports during an emergency, under the Export Administration Act of 1979 (EAA), §103(a) of the Energy Policy and Conservation Act (EPCA), or other authorities, if a policy decision were made to do so. Also, §7(d)(3) of the EAA provides authority to waive all export restrictions for purposes of meeting the U.S.' IEP obligations or fulfilling the U.S.-Israeli supply agreement. But the legal regime governing other petroleum exports is more complicated. There is no waiver provision for SPR crude oil as such; it is necessary to determine what laws apply to particular SPR oil which may be proposed for export.

"Short supply controls" under §7(a) of the EAA apply to all crude or product exports, and the Commerce Department's implementing regulations at 15 C.F.R. Part 377 require petroleum exporters to obtain validated licenses. These regulations also implement EPCA §103(b), which mandates a rule prohibiting crude oil exports unless they are determined to be in the national interest and consistent with the purposes of EPCA. Validated licenses now are routinely granted for product exports (except product refined from Naval Petroleum Reserves crude, export of which is statutorily precluded), although by law applications to export more than 250,000 bpd of product to any single destination in the same fiscal year are subject to a 30 day processing delay while Congress is notified. The "short supply" criteria for issuing validated licenses to export crude oil differ depending on the category of oil involved and on whether additional statutory restrictions apply to that category. If no other statutory restrictions are applicable to oil which is proposed to be exported, exports may be allowed: (1) temporarily, through Canada or Mexico; (2) in equal swaps with persons in Canada or Mexico; (3) in other equal swaps which reduce consumer prices, can be terminated in an emergency, are necessary because the export crude "cannot reasonably" be processed domestically, and are beneficial because the import crude otherwise wouldn't be imported;

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or (4) in swaps for refined product equal to what could be refined from the export crude domestically, if that crude for compelling economic or technical reasons "cannot reasonably" be processed in the U.S., and if the product imports will be as low priced as they would have been had the crude been processed at the nearest capable U.S. refinery.

Additional restrictions are imposed on other categories of crude under different statutes. The most stringent limitations are those with respect to Alaskan oil in EAA §7(d), as amended by the Trans-Alaska Pipeline Authorization Act. These effectively forbid the export of ANS oil unless an extremely difficult finding is made. Moreover, export is further conditioned upon passage of a concurrent resolution of Congress, a requirement which clearly is unconstitutional, but which possibly could be held not to be severable from the finding which would permit export, in which case the latter also would be invalid.

Another restrictive provision is §28(u) of the Mineral Lands Leasing Act, which, with limited exceptions, forbids the export of crude transported by pipeline over rights-of-way granted under §28, unless the President publishes his finding that, inter alia, the exports "will not diminish the total quantity or quality of petroleum available" to the U.S. In addition, the export of crude from the Naval Petroleum Reserves and from the OCS is subject to additional findings imposed, respectively, by the NPR Production Act of 1976 and the OCS Lands Act; the latter act contains a waiver of EAA restrictions for OCS oil "exchanged or exported pursuant to an existing international agreement."

The SPR contains imported, ANS, NPR and some other domestic oils (none of the SPR oil is known to have traversed a §28(u) right-of-way). Oils which fall into these different categories sometimes are commingled, and may become even more commingled during the withdrawal and distribution process. The SPR's contractual procedures are designed to sell oil quickly and assure its timely lifting. A bidder for SPR oil must post a bid bond, and each contractor will be liable for liquidated damages, backed up by a performance guarantee, if he fails to lift the oil at the contractually agreed time; thus, a bidder who wishes to export the oil will need to know, before he bids, whether export of the oil he is bidding for will be permitted. DOE and Commerce therefore are discussing preparations to implement alternative policy decisions concerning the export of SPR oil during a drawdown.

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